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No. 92-1084

In the Supreme Court of the United States

OCTOBER TERM, 1992

BRUCE GORDON, SR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners filed their administrative claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401(b), more than two years after their claim accrued.

2. Whether Section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 525, tolls petitioner Bruce Gordon, Sr.'s claim for medical expenses that may be incurred on behalf of his son, petitioner Bruce Gordon, Jr., because the latter's FTCA claim is time-barred.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 1a-5a, 6a) and the district court (Pet. App. 10a-21a) are unpublished. The judgment of the court of appeals is noted at 967 F.2d 586 (Table).

JURISDICTION

The judgment of the court of appeals was entered on June 25, 1992, and amended on October 5, 1992. A petition for rehearing was denied on October 5, 1992. Pet. App. 6a-7a. The petition for a writ of certiorari was filed on December 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 25, 1984, petitioner Brenda Gordon Brantley gave birth to a son, petitioner Bruce Gordon, Jr., at the United States Air Force Hospital in Wichita Falls, Texas.[1] Major Jyh-Chwen Liang, M.D., examined Brantley at 10:00 a.m. The examination showed the presence of meconium (*i.e.*, fetal waste) in the amniotic fluid and abnormal variability in the fetal heart rate. At 11:30 a.m., Dr. Liang determined that the fetus was in distress and decided to perform a Caesarian section. The procedure began at 12:15 p.m. and lasted approximately 25 minutes. Although Bruce, Jr., was born without a heartbeat, he was successfully resuscitated. Pet. App. 2a-3a.

The initial diagnosis was "[r]espiratory distress secondary to meconium aspiration." Pet. App. 15a. The baby was transferred to the Wilford Hall Medical Center in San Antonio, Texas, where he was treated for respiratory problems and seizures. In July 1984, the family moved to the McChord Air Force Base in Washington State. There, a doctor at the Madigan Army Medical Center advised Brantley that her son was delayed in developing, showed slow head growth, and might suffer seizures because of the fetal distress suffered at birth. In late 1984, a CAT scan showed that the child had severe brain abnormalities. *Id.* at 3a, 13a-14a.

2. Four years later, on October 3, 1988, petitioners filed an administrative claim with the Air Force under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671-2680. The claim alleged that their son's injuries resulted from the medical malpractice of government physicians. On November 15, 1989, the Air Force denied the claim after determining that it was barred by the FTCA's

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[1] Bruce, Jr.'s father, petitioner Bruce Gordon, Sr., was and continues to be on active duty with the Air Force. Pet. App. 2a.

two-year statute of limitations, 28 U.S.C. 2401(b). Pet. App. 3a.

3. Petitioners initiated this lawsuit under the FTCA, 28 U.S.C. 1346(b), 2671, in the United States District Court for the Western District of Washington. The district court held that the FTCA's two-year statute of limitations did not bar petitioners' claims, because petitioners "did not know, nor in the exercise of reasonable diligence should they have known the cause of the child's injuries more than two years prior to [filing their administrative claim on] October 3, 1988." Pet. App. 15a; see *id.* at 18a. Applying Texas law, the district court concluded that unreasonable delay in performing the Caesarian section proximately caused the child's injuries. *Id.* at 15a-17a. The court awarded Bruce, Jr., $7,887,023 in damages to cover lost earning capacity, medical expenses, one-time costs, taxes on interest, and pain and suffering. In addition, the district court awarded $275,000 to Brantley and $95,000 to Bruce, Sr., for past nursing and custodial services and for mental anguish arising from the impairment of the parent-child relationship. *Id.* at 18a-19a.

4. In an unpublished decision, the court of appeals reversed. The court noted that under settled case law, an FTCA claim accrues when a "plaintiff has discovered, or in the exercise of reasonable diligence should have discovered both his injury and its cause." Pet. App. 4a (internal quotation marks omitted). Concluding that the trial court's contrary finding was "clearly erroneous" (*ibid.*), the court of appeals held that petitioners Brantley and Bruce, Sr., "were aware of Bruce Jr.'s injury and its cause more than two years before they filed suit." *Id.* at 5a. In that regard, the court of appeals explained:

> Shortly after Bruce Jr.'s birth, Mrs. Brantley knew that he had breathing problems caused by meconium aspiration. When he was three months old, doctors

> told her they were concerned by his slow head growth. By late 1984, she knew that he was developmentally delayed and that the cause was stress at birth.

Pet. App. 5a. The court of appeals accordingly found petitioners' claims time-barred under the FTCA and reversed the judgment of the district court.

5. Petitioners filed a petition for rehearing, claiming that the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. App. 525, tolled the statute of limitations applicable to Bruce, Sr.'s claims. The government sent petitioners a letter advising them that it had not appealed the portion of the district court's judgment awarding damages of $95,000 to Bruce, Sr., and that the court of appeals' judgment should not be viewed as affecting that award. Pet. App. 8a. In view of that concession, the court of appeals amended its opinion to make clear that it was leaving that award undisturbed. *Id.* at 6a.

ARGUMENT

The court of appeals' unpublished decision correctly applies settled principles governing the accrual of claims under the FTCA, and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

1. Petitioners argue (Pet. 15-23) that the court of appeals erred in holding that their claims accrued more than two years before they filed their administrative claim with the Air Force.

Under the FTCA, a tort claim against the United States is barred unless brought "within two years after such claim accrues." 28 U.S.C. 2401(b). As this Court held in *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979), a medical malpractice claim accrues for purposes of the FTCA when a plaintiff becomes "aware of his injury and its probable cause." At the same time, this Court

rejected the premise that " 'accrual' of a claim must await awareness by the plaintiff that his injury was negligently inflicted." *Id.* at 123. Rather, when a plaintiff is "in possession of the critical facts that he has been hurt and who has inflicted the injury," he has sufficient information to trigger inquiry into whether those who provided medical service complied with the applicable standard of care and whether, in turn, a lawsuit should be filed. *Id.* at 122.

The courts of appeals have consistently interpreted *Kubrick* to hold that an FTCA claim for medical malpractice accrues when "a plaintiff has discovered, or in the exercise of reasonable diligence should have discovered, both his injury and its cause." *Herrera-Diaz* v. *Department of the Navy*, 845 F.2d 1534, 1537 (9th Cir.), cert. denied, 488 U.S. 924 (1988); accord, *e.g.*, *Otto* v. *NIH*, 815 F.2d 985, 988-989 (4th Cir. 1987); *Stoleson* v. *United States*, 629 F.2d 1265, 1268 (7th Cir. 1980). Moreover, if credible medical assurances or explanations conceal an injury or its cause from a claimant, then that consideration may affect the timing of when a cause of action has accrued. See, *e.g.*, *Rosales* v. *United States*, 824 F.2d 799, 804-805 (9th Cir. 1987); *Otto* v. *NIH*, 815 F.2d at 989; *Exnicious* v. *United States*, 563 F.2d 418, 421 (10th Cir. 1977).

Petitioners do not contest those basic principles governing the accrual of medical malpractice claims under the FTCA. Nor do they argue that the law of the Ninth Circuit in general reflects an improper understanding of *Kubrick*.[2] Rather, they merely claim that the Ninth

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[2] Indeed, petitioners argue (Pet. 17) that in *In re Swine Flu Prods. Liab. Litig.*, 764 F.2d 637, 641 (1985), the Ninth Circuit "properly broadened the application of the *Kubrick* rule." They also rely (Pet. 18-21) heavily on the Ninth Circuit's decisions in *Rosales* v. *United States*, *supra*, and *Raddatz* v. *United States*,

Circuit, in its unpublished decision, misapplied prior circuit precedent to the facts of this case. Even if such a claim of intracircuit conflict warranted this Court's review (but see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957)), the court of appeals did not err in applying established FTCA claim-accrual principles to this case.

As the court of appeals correctly held, petitioners "knew, or in the exercise of reasonable diligence should have discovered, both Bruce Jr.'s injury and its cause" by late 1984—four years before they filed the administrative claim in this case. Pet. App. 5a. Several undisputed facts support the court's determination. Soon after Bruce, Jr., was born, petitioner Brantley knew that their son had respiratory problems caused by meconium aspiration. *Ibid.* After his birth, Bruce, Jr., was transferred to another hospital, where he suffered seizures and was diagnosed with birth asphyxia and persistent fetal circulation. *Id.* at 3a. Several months later, doctors informed Brantley that they were concerned about the slow rate of growth of Bruce, Jr.'s head. *Id.* at 5a. By late 1984, Brantley was aware that Bruce, Jr., was developmentally delayed and that it was caused by stress at birth. *Ibid.*

Based on those undisputed facts, petitioners were or should have been aware that Bruce, Jr., had suffered severe injuries and that they were likely related to his birth. With those "critical facts" (*Kubrick*, 444 U.S. at 122) in their possession, petitioners were by late 1984 in a position to "seek[] advice in the medical and legal community" (*id.* at 123) about whether they had a claim relating to Bruce, Jr.'s injuries. To be sure, petitioners did not know whether Bruce, Jr.'s fetal problems during birth were a result of medical malpractice. But the essence of *Kubrick*, *ibid.*, is that petitioners did not have

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750 F.2d 791 (1984), to support their interpretation of 28 U.S.C. 2401(b).

to have that degree of knowledge before their claim accrued under the FTCA.[3] In the absence of any conflict in authority on the correct standards for measuring the accrual of a medical malpractice claim under the FTCA, the unpublished decision of the court of appeals in this case does not warrant further review.

2. Petitioners contend that Section 205 of the Soldiers' and Sailors' Civil Relief Act of 1940 (SSCRA), 50 U.S.C. App. 525, tolled the period of limitations on petitioner Bruce, Sr.'s claims arising from his son's injuries. The SSCRA provides in pertinent part as follows:

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[3] Petitioners err in contending (Pet. 19-21) that government doctors misled them into thinking that Bruce, Jr.'s injuries were caused by something other than malpractice. They claim (Pet. 19) that the government doctors' reference to Bruce, Jr.'s meconium aspiration and the natural stresses of labor indicated to petitioner Brantley that Bruce, Jr.'s injuries resulted from forces beyond the government's control. On the facts of this case, however, there is no reason to believe that a reasonable person would conclude that the injuries resulting from meconium aspiration were beyond the control of physicians. Soon after birth, Bruce, Jr., was diagnosed as having suffered birth asphyxia and fetal distress. Pet. App. 3a. By late 1984, moreover, petitioners knew that Bruce, Jr., had sustained serious injuries at birth, had had respiratory problems at birth, had suffered meconium aspiration, had undergone seizures shortly after birth, was developmentally delayed, and had severe brain abnormalities. *Ibid.* In light of that knowledge, a reasonable person would have investigated whether the identified cause of those severe injuries—fetal meconium aspiration and birth asphyxia—resulted from medical malpractice.

Contrary to petitioners' assertion (Pet. 19-20), this case is not in conflict with *Nemmers* v. *United States*, 870 F.2d 426 (7th Cir. 1989). Unlike this case, *Nemmers* involved a medical report that not only suggested that the injured child's cerebral palsy resulted from injuries in utero, but also affirmatively indicated that birth-related injuries were unlikely given the nature of the child's problems. See *id.* at 428.

> The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, department, or other agency of government by or against any person in military service or by or against his heirs, executors, administrators, or assigns * * * .

50 U.S.C. App. 525. Even if Section 205 of the SSCRA applies to servicemembers' claims under the FTCA and Bruce, Sr., is not required to show service-related hardship before invoking that provision,[4] petitioners are not entitled to relief here. Section 205 has never been held to toll limitations periods applicable to claims of servicemembers' family members. Cf. *Ray* v. *Porter*, 464 F.2d 452, 454 (6th Cir. 1972). Accordingly, the SSCRA does not toll the applicable two-year limitations period with regard to the FTCA claims of petitioners Brantley or Bruce, Jr. Petitioners do not contend otherwise.

With respect to petitioner Bruce, Sr.'s claims, the government does not contest the $95,000 in damages awarded by the district court for past nursing and custodial services and mental anguish and impairment of the parent-child relationship. Pet. App. 6a-9a. Petitioners, however, contend that the government must further compensate petitioner Bruce, Sr., for medical expenses associated with Bruce, Jr.'s care. See Pet. 13. That

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[4] On January 11, 1993, this Court heard argument in *Conroy* v. *Aniskoff*, No. 91-1353, which presents the question whether a servicemember must show service-related hardship before invoking the portion of Section 205 that tolls the period for the redemption of real property sold or forfeited to satisfy unpaid taxes. Since the present case does not turn on any question of service-related hardship, there is no reason to hold the petition for disposition in light of *Conroy*.

argument, however, is a thinly veiled effort to secure recovery on the time-barred medical claims of Bruce, Jr., who is not entitled to relief under Section 205 of the SSCRA.[5] Further, petitioner Bruce, Sr., has not made any showing that he would incur medical expenses on behalf of his son. See Gov't C.A. Reply Br. 10-11. In fact, as we noted in the court of appeals (see *id.* at 11), Bruce, Jr., is entitled to free medical care in military medical facilities because Bruce, Sr., remains an active-duty servicemember. See 10 U.S.C. 1072(2)(D), 1076. Thus, to the extent that Texas law recognizes a parent's right to recover a child's medical expenses up to the age of 18, see *Roth* v. *Law*, 579 S.W.2d 949, 956 (Tex. Civ. App.), writ ref. n.r.e. (Tex. 1979), there is no basis for making such an award on the record in this case. In any case, the state-law question[6] whether Bruce, Sr., can recover Bruce, Jr.'s medical expenses, if any, in the circumstances of this case does not warrant this Court's review.

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[5] The SSCRA also applies to actions by a servicemember's heirs, executors, administrators, or assigns. 50 U.S.C. App. 525. Petitioner Bruce, Jr., does not fit within any of those categories.

[6] In an FTCA action, the district court's jurisdiction extends to "claims against the United States, for money damages, * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b); see 28 U.S.C. 2674 ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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